IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1310

THOMAS L. HOUCHINS,
Petitioner,

—v.—

KQED, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS KQED, *et al.*

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Brief for Respondents KQED, et al.

QUESTION PRESENTED

Until this suit was filed, the sheriff completely excluded both the press and the general public from the county jail. Upon learning of an inmate's suicide in circumstances raising serious questions about jail conditions and compliance with court orders, respondent KQED sought access to the jail to ascertain and report the facts. Petitioner flatly refused. The district court found that news access reasonably necessary to prevent concealment of jail conditions from the public would not harm any legitimate interest of the sheriff. The court thus granted a preliminary injunction requiring the sheriff, under procedures to be determined

by him, to admit reporters at reasonable times except when jail security might be threatened. The question presented is whether, in these circumstances, the court erred in authorizing different access for news reporters than the sheriff now chooses to allow the public at large.

STATEMENT OF THE CASE

A. Proceedings In The Courts Below

Respondents (plaintiffs in the district court) are KQED, Inc. and the Alameda and Oakland branches of the NAACP. KQED is a nonprofit corporation engaged in educational television and radio broadcasting. Publicly-supported, KQED serves the counties in the San Francisco Bay Area. It maintains a daily television news program, entitled "Newsroom." The members of the NAACP plaintiffs are residents of Alameda County, California, and allege both an interest in knowing conditions in their county jail (whose prisoners are disproportionately black) and reliance on local news media to inform them so that they can participate meaningfully in the current public debate on county jail conditions (A. 4).[1/]

1/ Citations to "A" refer to pages of the Appendix.

Petitioner Houchins is the Sheriff of Alameda County and operates the county jail. When the sheriff excluded KQED and all news reporters, as a matter of general policy, from investigating events and conditions at the jail, respondents filed this suit and moved for a preliminary injunction (A. 7). The motion was based on supporting affidavits (A. 8,13,14,16, 18,59,60,63,64) and on the testimony at an evidentiary hearing of the Sheriff of San Francisco County, an official from San Quentin State Prison and several experienced news reporters.

The district court granted preliminary injunctive relief, requiring petitioner to allow reasonable access by reporters to the jail (A. 66-71). The specific methods of implementing such access were left to the sheriff. He then sought and was granted a temporary stay of the order, to enable him to develop specific procedures for access (R.66-68,74).[2/] But instead of implementing any such procedures, the sheriff filed notice of appeal and obtained a stay from two judges of the Ninth Circuit. The

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2/ Citations to "R" refer to pages of the certified Record on Appeal in the Ninth Circuit.

appeal was then expedited on respondents' motion.

On November 1, 1976, the Court of Appeals unanimously affirmed the district court's order. On December 22, 1976, the court below denied rehearing, no member of the entire Ninth Circuit voting to rehear the case en banc. The Court of Appeals denied a stay pending certiorari. A stay was granted by Mr. Justice Rehnquist on January 28, 1977.

B. Statement of Facts

1. Events leading to this suit.

KQED's Newsroom has for many years reported regularly on news at prisons and jails in the San Francisco Bay Area (Tr. 167-70; A. 9-10; P.Exh. 4,5).[3/] A large number of stories have been covered on the premises of the institutions, with film, video or still camera. Included have been reports from the San Francisco, Contra Costa, San Mateo and Santa Clara County jails and San Quentin and Soledad prisons. None of this activity has ever caused

3/ Citations to "Tr." refer to pages of the Reporter's Transcript of the evidentiary hearing held on November 6 and November 10, 1975. Citations to "P.Exh." and "D.Exh." refer, respectively, to plaintiffs' and defendant's exhibits received in evidence at the hearing.

any institutional disruption of any kind (Tr. 170-71; A. 10, 13, 14-15, 64-65).[4/]

In March, 1975, KQED's Newsroom learned of and reported the suicide of a black prisoner at the Alameda County jail (Tr. 171; A. 11). KQED received information that the suicide occurred shortly after a county judge had ordered a psychiatric examination of the inmate, but officials had not provided one (A. 11). The suicide occurred in a facility whose conditions a federal court in San Francisco had previously condemned as "shocking and debasing," violating "basic standards of human decency."[5/] KQED also reported statements by a psychiatrist employed at the jail that conditions in the facility were partly responsible for the prisoners' emotional problems. The psychiatrist

4/ In covering stories on location in jails and prisons, KQED recognizes that inmates are entitled to privacy, and this is respected. As a matter of policy, KQED does not photograph or interview inmates without their consent (Tr. 170-71; A. 11). When appropriate or required, KQED obtains formal written consents (Tr. 171).

5/ The "truly deplorable" conditions were found to be cruel and unusual punishment. Brenneman v. Madigan, 343 F.Supp. 128, 132-33 (N.D. Cal. 1972).

was fired after he appeared on Newsroom (Tr. 186-87). KQED quoted the sheriff as denying that the conditions were responsible for the prisoners' problems (A.11).

KQED's news anchorman telephoned petitioner Houchins and requested permission to see the jail facility in question and take pictures there (A.11; Tr. 171). The sheriff refused, stating only that it was his "policy" not to permit any press access to the jail (Id.). He gave the same response to another television reporter who sought to cover stories of alleged gang rapes and poor conditions at the jail (Tr. 208-209). KQED attempted to follow events with subsequent reports on a Board of Supervisors investigation of certain jail conditions (Tr. 172-73), and with stories of the public debate on whether and where to build a costly new jail (P.Exh. 5), but without access to the jail.

Until this suit was filed, access to the jail was denied to all, even though the sheriff testified that he had never heard of any disruption in any jail or prison, anywhere, because of news access (A.69; Tr. 126-28).[6/]

6/ A previous sheriff had conducted one

2. The guided tours.

After this suit was filed, petitioner initiated a series of six monthly guided tours for the public.[7/] Each tour was limited to 25 persons (Tr. 174). The tours were booked on a first come-first served basis. Reporters were permitted to go on the tours if they signed up in time. Since public interest exceeded tour capacity, all six tours for 1975 were completely booked within a week after they were announced in July (Tr. 116-17; A. 59-60, 63-64). Thus, anyone, including a news reporter, who did not instantly sign up for a tour weeks or months in advance was completely barred from the jail for the balance of the year (Id.).

6/ continued.

"press tour" in 1972, attended by reporters and cameramen. But the facility had been "freshly scrubbed" for the tour and the reporters were forbidden to ask any questions of the inmates they encountered (A. 16-17). Subsequent attempts by reporters to cover stories at the jail were rebuffed by the sheriffs (Id.; Tr. 207-10).

7/ The sheriff testified that he initiated the tours in order to gain support for the construction of new jail facilities in the county (Tr. 81, 129).

At the outset of each tour, a jail official laid down the ground rules for the tourists. It was forbidden to speak with any inmates who might be encountered (A. 61; Tr. 62, 175). No photographs were permitted (A. 61; Tr. 62, 174). The sheriff offered a series of 20 photographs for sale to the tourists, at $2 each or $40 for the set (Tr. 65; A. 61).[8/]

The evidence before the district court demonstrated several ways in which restriction to the tours frustrated reporting of jail conditions to the public:

(a) The tours were "guided" by several guards (Tr. 57-58; A. 61-62), who took the tourists through most but not all of the jail facilities. Excluded was the notorious "Little Greystone" (A. 61; Tr. 30, 174-75), the scene of alleged beatings, rapes and poor conditions (Tr.

8/ The photos are D.Exh. "D". There were no photos of the women's cells (Tr. 64), of the "safety cell" (Tr. 65), of the "disciplinary cells" (Tr. 67), of the interior of Little Greystone or of the bakery, laundry or fire station (Tr. 39). The photo of a Big Greystone cell omits the wire mesh ceiling and the catwalk above the cell that allow guards to peer down on the inmate (A. 61; Tr. 176). The day room photo omits the television monitor that observes inmates and the open urinals (Id.).

174-75, 208). Also excluded were the "disciplinary cells" (Tr. 67).

(b) The tourists were not allowed to ask even simple questions of randomly encountered inmates.[9/]

(c) The sheriff required that inmates generally be removed from view (Tr. 106). Thus, the tourists never saw normal living conditions at the jail (A. 61).

(d) The tourists were not permitted to take any cameras with them. A reporter testified that "The most effective thing we can do on television is not filter [the information] through a reporter, but show it directly" (Tr. 180). Other reporters stated that the inability to publish realistic pictures of jail conditions made it difficult to convey accurate information to the public (A. 64-65; A. 62; cf. A. 16-18). The sterile and unrealistic photos proffered for sale by petitioner showed only selected

9/ Thus, for example, tourists would not be allowed to ask an inmate they saw "What did you have for lunch?" or "Is it always this clean?" or "What was it like during the fire last week?" or "How's the noise level here?" or "Did the recent women's riot lead to any reforms?"

plant and equipment and did not hint at the actual conditions of life in the jail (A. 61; Tr. 176).

(e) Finally, offering only a periodic tour made it impossible to cover a specific event or follow a developing news story (Tr. 175-76; A. 62-63). News events do not coincide with the sheriff's schedule of tours. Limitation to a scheduled tour made it impossible to cover an escape, a fire or a suicide as soon afterward as access could safely be provided, or a new facility, program or other event of public interest. It also made it possible for the jail to be "scrubbed up," as was done for a press tour conducted by a previous sheriff (A. 17).

3. Access to other jails and prisons.

The evidence before the district court showed that other jails and prisons in the area do not have limitations of the kind imposed by petitioner Houchins, that they routinely provide free press access and that such access creates no problems whatever:

a. San Francisco County.

The Sheriff of San Francisco operates

four jails. He routinely authorizes reporters to enter and cover stories in his jails (Tr. 190-92; A. 15). The reporters are permitted to use cameras and sound equipment (Tr. 196, 216). The sheriff also permits interviews of both inmates and staff (Tr. 196). Never, on any occasion, has this access created any security problems or any disruptions (Tr. 191-92; A. 15). This access does not disrupt jail routine or the constant movements of prisoners within or without the jail (Tr. 192-95, 198-99). Nor does it create extra work or overtime for jail staff (Tr. 203). Inmate privacy is protected by guidelines prescribing that none will be photographed or interviewed without his consent (Tr. 202).

Further, the San Francisco Sheriff advanced affirmative reasons, from the point of view of a correctional administrator, for admitting reporters to the jails. He testified that jails "routinely end up being places that are extraordinarily and most unnecessarily abusive to people" and that news coverage of conditions enhances public awareness and thus motivates county government to provide adequate funds for more decent facilities (Tr. 193-94; A. 15).

b. Other County jails.

The evidence showed that KQED and other stations have done stories on the premises of numerous other county jails and prisons, without any difficulties or disruptions of any kind (A. 9-10; P.Exh. 5; Tr. 167-70). The State of California's Guidelines for Local Detention Facilities, offered in evidence by petitioner (D. Exh. I), state that: "As in any government operation, the public has a right to know how and why its tax dollars are spent in detention and corrections. . . . In particular, the various news media should be provided with accurate and timely information so that the public can be adequately informed at all times" (p. 22).

c. San Quentin.

San Quentin's Public Information Officer testified about the press policy of the California Department of Corrections and its implementation in San Quentin (Tr. 143-65). The Department provides for completely open news access to the prisons, with reporters allowed to use cameras and sound equipment, to view all areas of the prison (including all maximum security areas), to talk with prisoners generally and to interview prisoners of their choice (Id.,

P.Exh. 3) The Department's premise is the citizen's "right to know," through the press, conditions in the prisons (Tr. 144; P.Exh. 2, 3).

The San Quentin official testified that arrangements for reporters to come to the institution are very simple, and are made the same day of the request (A.64-65; Tr. 148-49). The official usually accompanies the reporters, but no guards are part of the escort (Tr. 149-50). Although there are considerable movements of prisoners within San Quentin (they are "moving all day long," including some who go to court outside the prison, Tr. 150-51), San Quentin has experienced no disruptions or security problems whatever because of press access (Tr. 151). Inmates are in their cells or going about normal institutional activities while reporters are present (Tr. 155, 164). The press could of course be excluded by the warden if any security problem developed (Tr. 161-62). None has.[10/]

In addition to providing open news media access, San Quentin has frequent tours

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10/ The record here shows that the California authorities have completely abandoned the press restriction they defended as essential to security in Pell v. Procunier, 417 U.S. 817 (1974).

for the general public, during which inmates are regularly encountered (Tr. 153-54).

d. National policy.

The district court received in evidence the relevant standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals (P.Exh. 1). The Commission was appointed by the Law Enforcement Assistance Administration to formulate standards for institutions benefitting from LEAA grants. Petitioner Houchins has received substantial funds from LEAA, including a grant for the reconstruction of the jail (Tr. 118-19), but he does not comply with the standards. Standard 2.17 provides that:

> "Representatives of the media should be allowed access to all correctional facilities for reporting items of public interest consistent with the preservation of offenders' privacy."

Current policy for the Federal Bureau of Prisons is expressed in the Policy Statement that the Ninth Circuit appended to its opinion in this case. The Bureau encourages news media access to all prisons "to insure a better informed public." Reporters may freely use cameras and tape

recorders, talk to randomly encountered prisoners, conduct interviews, etc.[11/]

4. Experience of other news reporters.

The evidence before the district court also included unsuccessful attempts by other news reporters to cover stories at the Alameda County jail (A. 16-18, 63-64; Tr. 207-210). One who wished to investigate reported gang rapes and suicide spoke personally with Sheriff Houchins, who excluded him from the jail. The sheriff gave no reason except that it was his "policy" not to allow entry (Tr. 208-9). The reporter also tried to go on the first guided tour of the jail in July, 1975. He promptly signed up but was removed from the list when someone in the sheriff's office decided that more members of the public and fewer members of the press would be permitted to go (Tr. 209-10).

5. The district court's order.

Finding that the requirements for a preliminary injunction were met, the district

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11/ As the Policy Statement indicates, the Bureau has completely abandoned the press restriction it defended as essential to security in Saxbe v. Washington Post, 417 U.S. 848 (1974).

court enjoined the sheriff, during the pendency of this suit, from excluding the press "as a matter of general policy" (A. 71). The order directed that reporters be given access "at reasonable times and hours" for the purpose of providing news coverage of jail conditions. Deferring to the sheriff's administrative discretion, the court provided that "the specific methods of implementing" access were to be "determined by Sheriff Houchins" (A. 70). Further, the order expressly stated that the sheriff may "in his discretion" deny all access "when tensions in the jail make such media access dangerous" (A. 71).

The sheriff sought and was granted a temporary stay to develop specific procedures covering such matters as searches of reporters and their equipment, proper identification of press representatives, instructions as to items that could not be photographed, consent forms for interviews, etc. (R. 66-68, 74). The sheriff represented that he needed eight working days for this purpose (R. 67).

SUMMARY OF ARGUMENT

Conditions in the Alameda County jail have been of particular public concern in

recent times. County citizens need to be informed in order to make intelligent decisions about publicly-determined jail issues, including whether the sheriff's performance merits his re-election. KQED, the local public television station, seeks to meet this public need by reporting jail conditions and events. Its activity and the public's right to receive the information are complementary interests protected by the First Amendment.

I.

Respondents seek, and the district court authorized, substantially the same press access to the county jail as was in fact permitted by the institutions in Pell v. Procunier and Saxbe v. Washington Post Co. The Court's statement in Pell-Saxbe, to the effect that newsmen have no special access to information not shared by the public generally, must be read in context. The prisons in those cases permitted very substantial press access, reasonably sufficient to insure against concealment of conditions or events of public concern. The sole restriction was a rule against journalists designating individual prisoners for interviews. The Court found this narrow restriction

justified by evidence of security risks existing at the time. The restriction took the form of duly considered departmental and federal regulations, tailored to a particular situation and entitled to certain deference. In contrast, petitioner's "policy" needlessly shuts off inquiry into official conduct and conditions in a local jail whose largest category of detainees are charged with driving offenses.

This case does not involve any attempt to probe into confidential information or sensitive executive or judicial deliberations. Nor do respondents contend that the sheriff has any affirmative duty to turn over information to the press. But he may not bar attempts by reporters to seek out non-confidential information simply by erecting an identical bar to the public generally.

Adopting petitioner's position as a constitutional rule -- that in no circumstances are reporters entitled to different access than the general public -- would authorize him completely to exclude the press, as he did until this suit was filed, provided only that he also excludes the general public. It would sanction the concealment of jail conditions that gave

rise to this suit. Access to the tax-supported jail run by an elected sheriff is not a privilege to be granted or withheld simply as petitioner pleases, without regard to the existence of any solid state interest. Access substantially like that permitted in Pell-Saxbe is the minimum needed to get timely and complete information to the public. It represents a reasonable accommodation between, on the one hand, press or public access at will and, on the other, arbitrary exclusion unduly constricting the flow of information to the public.

Reasonable "time, place and manner" restrictions can be implemented. But there are good reasons why such restrictions should not be identical in all circumstances for the press and the general public. In one respect, the sheriff can impose greater restrictions on reporters than he imposes on the touring public, as he can insist on proper credentials, can screen them and can search them and their equipment. In other respects, lesser restrictions are required, for there is a valid distinction between the right to the information sought and the means of physical access to it. The press and the general public have equal rights to

non-confidential information. But both the purposes of access to the information and the practical problems involved call for differences that the law ought not to ignore. Neither the holding of Pell-Saxbe nor sound policy requires that press and general public access be blindly equated regardless of the circumstances.

II.

The sheriff's access restrictions were demonstrated to be far greater than necessary to protect any substantial governmental interest. The district court found on ample evidence that jail security would not be threatened by reasonable access. Nor does limited access on reasonable notice by reporters entail the administrative disruption that the sheriff asserts is caused by his cumbersome "tours." Prisoner interests in privacy are easily protected. The record affirmatively shows that none of petitioner's expressed concerns is in fact a problem. There is no reason why the sheriff cannot provide substantially the same access as routinely provided by the other jails and prisons in the area.

III.

The sheriff's mail, visiting and

telephone rules governing prisoners do not serve the same purposes and cannot conceivably meet the public need for information on jail conditions. The periodic guided tours for the general public disclose certain plant and equipment to the handful of citizens who can journey to the remote jail to take the tours. But they are basically irrelevant to the need to report events and get timely information to the public at large.

ARGUMENT

Introduction

"[C]onditions in this Nation's prisons are a matter that is both newsworthy and of great public importance." Pell v. Procunier, 417 U.S. 817, 830 n.7 (1974).[12/] Jail and

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12/ Noting that conditions in similar institutions "are of great interest to the public generally," Judge Mansfield has elaborated as follows:

> "Such public interest is both legitimate and healthy. Quite aside from the fact that substantial sums of taxpayers' money are spent annually on such institutions, there is the necessity for keeping the public informed as a means for developing responsible suggestions for improvement

prison conditions are of public concern not simply when they result in riots, disturbances, escapes, tragic fires, suicides and the like, but also when a new facility is planned or innovative program developed. Jails and prisons are, after all, public institutions. They cost a great deal of tax money to build and operate. But unique among public institutions, they exist for the purpose of involuntarily confining and isolating certain citizens; their very invisibility presents the risk of abuse of individual liberties.13/

12/ continued.

> and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestions or protests." Cullen v. Grove Press, Inc., 276 F.Supp. 727, 728-29 (S.D.N.Y. 1967); see also Nolan v. Fitzpatrick, 451 F.2d 545, 547 (1st Cir. 1971).

13/ In contrast, "The openness of the public school and its supervision by the community afford significant safeguards against the kind of abuses from which the Eighth Amendment protects the prisoner." Ingraham v. Wright, ___ U.S. ___, 97 S.Ct. 1401, 1412 (1977) (emphasis added). In Ingraham, the Court decided that although the Eighth Amendment protects prisoners, public school students do not need its protection from corporal punishment.

Conditions in Alameda County's jail have been of particular public concern in recent times. First, a federal court determined that conditions in one facility were so "shocking and debasing" as to violate the Eighth Amendment.14/ Then there were the suicide in that facility and the related developments that led to this suit, raising serious questions about jail conditions and compliance with court orders (pp.5-6, supra). Finally, during all this period the county has been debating whether and where to build new jail facilities costing many millions of dollars. The sheriff is elected by the public in Alameda County. It may not be in his self-interest to have public attention focused on matters he considers unfavorable, but county citizens, like the NAACP respondents in this case, should not be deprived of information necessary to assess his performance or to make intelligent decisions on publicly-determined jail issues. KQED, the local public television station, would like to meet this public need for information, by gathering and publishing

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14/ Brenneman v. Madigan, 343 F.Supp. 128, 132-33 (N.D. Cal. 1972). The decision, requiring extensive relief, was not appealed.

it. Mr. Justice Stevens, concerned about "inadequate public awareness of the nature of our penal system," has pointed out that: "from the standpoint of society's right to know what is happening within a penal institution, it is perfectly clear that traditional First Amendment interests are at stake." Morales v. Schmidt, 489 F.2d 1335, 1346 & n.8 (7th Cir. 1973).

Respondents' First Amendment interests are complementary --the right of the public to receive the information, and the right of the press to seek it out. First Amendment protections for gathering and publishing news "are not for the benefit of the press so much as for the benefit of all of us." Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); see also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975). At stake in gathering information on jail conditions is the "right of the public to receive such information". Pell v. Procunier, supra, 417 U.S. at 832. The recipient's right, grounded on the First Amendment, has often been recognized.15/ As the Court said in a related

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15/ See Pell, supra, at 832; Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 756 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972); Red Lion Broadcasting

context, the addressee of a communication from prison has a First Amendment right against "unjustified governmental interference with the intended communication." Procunier v. Martinez, 416 U.S. 396, 409 (1974).

Regarding KQED's interest, the Court has acknowledged that "Without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972). As Mr. Justice Stewart explained,

> "The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated . . . . News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised." Id. at 727, 728 (dissenting opinion).16/

15/ continued.

Co. v. FCC, 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965); Thomas v. Collins, 323 U.S. 516, 534 (1945).

16/ Mr. Justice Stewart has also pointed out that the First Amendment's freedom "of the

Thus, the Court has recognized that "Newsgathering is not without its First Amendment protections." Id. at 707; Pell v. Procunier, supra, 417 U.S. at 833.17/

The present case involves the extent to which citizens are entitled to learn, through their local press, what is happening in their county jail.

16/ continued.

press" clause is unique -- the press is the only nongovernmental organization explicitly given constitutional protection. Stewart, "Or of the Press", 26 Hastings L.J. 631, 633 (1975).

17/ See also Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Lewis v. Baxley, 368 F.Supp. 768, 775 (M.D. Ala. 1973) (three-judge court); Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971); Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505 (1974). Long ago the Court affirmed that the First Amendment was not designed merely to prevent censorship of the press but also "any action of the government by means of which it might prevent such free and general discussion of public matter as seems absolutely essential to prepare people for an intelligent exercise of their rights as citizens." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (quoting Judge Cooley). See also Mills v. Alabama, 384 U.S. 214, 219 (1966); New York Times Co. v. United States, 403 U.S. 713, 717 (1971).

I. The Decision Below Is Consistent With Pell v. Procunier And Saxbe v. Washington Post.

Respondents seek, and the district court authorized, substantially the same press access to the county jail as was in fact permitted by the institutions in Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

Petitioner Houchins has never contended that county citizens have no right to be informed of jail conditions or that KQED is without First Amendment protection in seeking out the news. Instead, he points to the following statement in the Pell and Saxbe opinions:

> "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public. . . . The Constitution does not. . .require government to accord the press special access to information not shared by members of the public generally." Pell v. Procunier, supra, 417 U.S. at 834; Saxbe v. Washington Post Co., supra, 417 U.S. at 850.

Based on this statement,18/ the sheriff argues

18/ The Court's sole reliance for this proposition in Pell-Saxbe was on Branzburg v. Hayes,

that it is irrelevant whether his restrictions needlessly frustrate reporting of jail conditions -- all he has to do is mechanistically equate KQED's rights with those of the public in general, wholly excluding both or limiting both to guided tours. But the holdings of Pell and Saxbe do not require this result. Nor does sound policy.

18/ continued.

408 U.S. 665 (1972). The opinion in Branzburg contained a similar statement, but all the case held was that a newsman had no constitutional privilege to resist testifying before a grand jury investigating crime of which he had knowledge. As the Court noted in Branzburg, "The sole issue before us is the obligation of reporters as other citizens to respond to grand jury subpoenas relevant to an investigation into the commission of crime." 408 U.S. at 682 (emphasis added). The Court also pointed out that (unlike the situation here) its holding involved "no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire" Id. at 691 (emphasis added). The Branzburg "access" dictum in turn relied on Zemel v. Rusk, 381 U.S. 1 (1965). In Zemel the Court held that a citizen did not have a constitutional right to have his passport validated for travel to Cuba. "[T]he weightiest considerations of national security," 381 U.S. at 16, militated against this asserted right. There was no issue whatever as to the rights of the press.

The sole restriction on access upheld by Pell and Saxbe was a prison rule against the press designating specific inmates for interviews. The Court's "no special access to information" statement must be read in the context of prisons that already permitted very substantial press access. Thus, the Court expressly pointed out in Pell that "both the press and the general public are accorded full opportunities to observe prison conditions." 417 U.S. at 830 (emphasis added). After noting that the prisons conducted regular tours for the public, the Court found that "In addition, newsmen are permitted to visit both the maximum and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter." 417 U.S. at 830 (emphasis added). Newsmen were permitted "to enter the prisons to interview" randomly selected inmates, and to observe program group meetings and interview the participants. Id. The same was true in Saxbe. There, the Court noted that "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there." 417 U.S. at 847. In addition,

newsmen were permitted to tour and photograph any prison facilities and interview inmates they encountered. Id. at 847, n.5.

Indeed, in both cases press access to the prisons involved was substantially broader than that of the general public, as the Pell opinion emphasized no less than three times, 417 U.S. at 830-31, 831 n.8, 833, and Saxbe twice, Id. at 847, 849. (Public access was limited, as here, to correspondence, visitation and guided tours.)

In short, the no-interview rule in Pell and Saxbe was upheld only on a record showing that reporters in fact had substantial access to the prisons, access reasonably sufficient to insure against concealment of conditions or events of public concern.[19/] As the district

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19/ The same was true in Garrett v. Estelle, ___ F.2d ___, No. 77-1351 (5th Cir. Aug. 3, 1977), where a television cameraman sued for the right to film an execution from the execution chamber. Far from concealing the event, the state authorized Associated Press and United Press reporters actually to be present in the execution chamber and to act as press pool representatives; it also made facilities available for other press corps members to view a simultaneous closed circuit telecast; and it authorized interviews of death row inmates. This access assured coverage of the grisly

court noted in the present case, the Pell-Saxbe access is precisely the same sought by KQED. Thus, KQED can be granted all the relief it seeks and it will have no more access than the press had in Pell-Saxbe.[20/] The district court order is consistent with the holdings in those cases.[21/]

19/ continued.

event itself; the court simply upheld a narrow restriction on the manner of coverage.

20/ In his opinion on petitioner's stay application, Mr. Justice Rehnquist stated that "concededly the access of the public and the press to the Alameda County jail is less than was their access to the California prisons in Pell" (Appendix to Petition for Certiorari, p. 37), and noted the possibility that the Pell and Saxbe "no special access" statement would not necessarily be dispositive if "impliedly limited to the situation where there already existed substantial press and public access to the prison" (Id. at 38). We contend that Pell and Saxbe do not control for this reason and because of the other distinctions and policy considerations that follow.

21/ Part of the district court's order here does authorize "inmate interviews," without further definition (A. 71). This was clearly meant to authorize the same kind of random or anonymous interviews permitted in Pell and Saxbe (A. 69). The sheriff permits interviews of specifically designated pretrial detainees

Moreover, the narrow no-interview restriction in Pell-Saxbe was supported by evidence in both cases of security risks existing at the time -- undue attention to "big wheels" who had gained notoriety and influence over other prisoners.[22/] The restriction was a measured response to particular violent episodes. It took the form of duly considered departmental and federal regulations aimed at a particular problem. Here, in contrast, the jailer's restrictive "policy" is not specifically authorized by any statute or regulation, or tailored to any emergency. It can be altered by the moment as the sheriff pleases. It is not entitled to great deference.

In addition, the local county jail is a different kind of institution from the prisons involved in Pell and Saxbe. Instead of confining felons, many of whom are recidivists convicted of very serious crimes, the county jail

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21/ continued.

(but not sentenced prisoners), provided that reporters obtain formal consents (A. 30).

22/ As noted above (nn. 10,11, supra), the institutions involved in Pell and Saxbe have since abandoned their "no-interview" rules.

has only pretrial detainees and persons convicted of misdemeanors or serving short felony terms. According to the sheriff's evidence, the largest number of pretrial detainees at the jail are charged with driving offenses, including drunk driving (28%); drug charges account for 14%; only 7% are charged with assault, 6% with burglary and 2% with robbery (D.Exh.F, last page). Apart from the different kind of security risks in the prisoner population, the penal interests of deterrence and rehabilitation, mentioned in Pell, have no application to pretrial detainees, who have not been convicted of any crime.

This case does not involve an attempt to acquire confidential "information not shared by members of the public generally." Pell, supra, at 834. KQED does not assert any right to probe into matters that should properly be secret or confidential, such as sensitive executive or judicial deliberations. Its reporters do not seek to observe security staff conferences or inspect riot control plans.[23/] These

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23/ Similarly, KQED does not complain of being "regularly excluded from grand jury proceedings, [the Court's] own conferences, the meetings of other official bodies in executive

are instances in which government has a need to keep the information confidential, while in the present case there is a need to have the information on jail conditions made public. We recognize, with Mr. Justice Stewart, that the First Amendment itself is not a Freedom of Information Act, requiring "openness from the bureaucracy." Stewart, Or of the Press, 26 Hastings L.J. 631, 636 (1975). KQED therefore does not contend that the sheriff has any affirmative duty to turn over information to the press, make himself available to explain policy, open his files to inspection, or even notify the press

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23/ continued.

session, and the meetings of private organizations." Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972); see also Trimble v. Johnston, 173 F.Supp. 651 (D.D.C. 1959) (reporter not entitled to inspect confidential government payroll records). Nothing about a jail cell represents either a deliberative or confidential government function. Branzburg's additional comment that "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded" (Id.), refers to emergencies. This is not an issue in the present case because the district court order expressly acknowledges the sheriff's power to deny all access if he thinks jail tensions would make access dangerous.

of important occurrences.24/ But he cannot bar attempts by news reporters to seek out non-confidential information simply by erecting an identical bar to the public generally.

Adopting petitioner's position as an inflexible constitutional principle -- that in no circumstances are reporters entitled to different access than the general public -- would authorize him completely to exclude the press, as he did until this suit was filed, provided only that he also excludes the general public. It would sanction the concealment of jail conditions that gave rise to this suit, and deprive the electorate of information necessary to evaluate the conduct of the elected sheriff's office. The guided tours could be swiftly cancelled. The sheriff could at his whim impose a total information blackout, regardless of whether there is any justification in terms of jail security or any other valid penal interest.

24/ Federal and California prisons are required by regulation promptly to inform the press of any newsworthy event and permit reporters to cover the story. Federal Bureau of Prisons, Policy Statement 1220.1 B, sec. (f)(1) (Appendix to Petition for Certiorari, p. 12); California Department of Corrections, Administrative Manual, §415.08 (P. Exh. 3; Tr. 144-49).

Giving this kind of unfettered discretion to any public official is plainly inconsistent with safeguarding First Amendment interests.25/

The Court should firmly reject the sheriff's notion that access to the tax-supported county jail, by either press or individual members of the public, is a privilege to be granted or withheld as he pleases. His position is not sanctioned by California case

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25/ See generally Southeastern Promotions Limited v. Conrad, 420 U.S. 546, 553 (1975); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969); Main Road v. Aytch, 522 F.2d 1080, 1098 (3d Cir. 1975). In Procunier v. Martinez, 416 U.S. 396, 415 (1974), the Court remarked that "Not surprisingly, some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism."

law26/ or statutes,27/ or by this Court's

26/ The California case most directly in point acknowledged that a sheriff may "reasonably regulate the operation of the jail" but held that even a convicted felon, who was serving as an attorney's investigator, was entitled to visit the jail because there was "no showing. . .that the. . .visits to the jail cannot be so handled as to avoid endangering security." Clifton v. Superior Court, 7 Cal.App.3d 245, 255 (1970). Mathis v. Appellate Department, 28 Cal.App.3d 1038 (1972), held that jail officials may restrict visitation "in ways reasonably consistent with the security of the facility." Id. at 1041. Davis v. Superior Court, 175 Cal.App.2d 8 (1959), held that "reasonable" rules on prison communication are permissible. Id. at 19-20. Yarish v. Nelson, 27 Cal.App.3d 893 (1972), like Pell, upheld a narrow rule against a press interview of a specific prisoner. In doing so, the court followed what it called a "reasonableness" test, based on United States v. O'Brien, 391 U.S. 367 (1968), discussed at p. 44, infra.

27/ Cal. Govt. Code §26605 simply says that "The Sheriff shall take charge of and keep the county jail and the prisoners in it." Various Penal Code provisions make it a crime to communicate with a prisoner without permission of the officer in charge (§4570); to use false identification to gain admittance (§4570.5); if a former convict, to come on the grounds without consent (§4571); and, if a tramp or vagrant, to come on the grounds and communicate with a prisoner (§4572).

decisions.[28/] Nothing authorizes him needlessly to shut off inquiry into jail conditions. Access substantially like that permitted in Pell-Saxbe is the minimum needed to get timely and complete information to the public. It represents a reasonable accommodation between, on the one hand, press or public access at will and, on the other, arbitrary exclusion unduly constricting the flow of information to the public.

Reasonable "time, place and manner" restrictions can of course be implemented. But there are good reasons why such restrictions should not be identical in all circumstances for the press and the general public. A valid distinction may be drawn between the right to

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28/ Saxbe v. Washington Post Co. does mention the "truism that prisons are institutions where public access is generally limited," 417 U.S. at 849, but does not specify what the limitations are. Adderly v. Florida, 385 U.S. 39 (1966), simply upheld trespass convictions of students who conducted a demonstration that actually blocked the jail entrance used to transport prisoners. 385 U.S. at 45. The lower court decisions cited by the sheriff (Petitioner's Opening Brief, pp. 26-27) do not involve jails at all. They simply recognize, as we do, that not every public building is required to serve as a "forum" for protests and demonstrations.

the information sought and the means of physical access to it. The press and the general public have equal rights to non-confidential information. But when it comes to physical access to the information, both the purposes of access and the practical problems it presents call for differences that the law ought not to ignore.[29/]

It is impractical to have free access for the general public randomly to inspect jail facilities. Both their numbers and their unpredictability weigh in favor of organized, controlled, periodic access like petitioner's tours. This is especially true where, as here, the sheriff does not take the precautions of requiring members of the public to present any identification, submit to any screening, state

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29/ As Judge Hufstedler pointed out below, "it does not follow that regulations that are reasonable under the circumstances as applied to touring groups of the public are also reasonable as applied to new media personnel. . . . Guided public tours and news media access do not serve identical purposes nor do they involve identical practical problems." (Appendix to Petition for certiorari, p. 25). Judge Duniway similarly found the administrative problems "obviously" different and reasoned that "the law ought to recognize the differences" (Id. at 22).

any purpose for wanting to view the jail or be searched (Tr. 75). But under the district court's order, the sheriff can insist on proper identification of reporters, screen them and search them and their equipment. In this specific respect, the sheriff can reasonably impose greater restrictions on reporters than on the general public.

But less restrictive provisions are also required. Aside from the practical differences justifying different kinds of access, press and public have different purposes for going to the jail. Members of the general public may wish to see the jail for some personal reason, or out of idle curiosity. But reporters go for reasons unique to the function which the press performs on behalf of the public--to cover events of public interest, and to gather and publish information on jail conditions. They serve as the "eyes and ears" of the public at large. To fulfill this purpose, they need access at least approximating that permitted in Pell-Saxbe. Reporting of news events, in particular, cannot await next month's public "tour."

The only way the public at large will be informed of conditions at the Alameda County

jail is through the press. The jail is located in a remote corner of the county, almost an hour's drive from the population center of Oakland (Tr. 55), and practically inaccessible by public transportation. Without reasonable press access, taxpayers and voters will remain ignorant of jail conditions and unable intelligently to decide on publicly-determined issues of jail policy. As Judge Duniway pointed out below,

> "[I]n our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about the public's business. Witness 'Watergate' and its remarkable consequences." (Appendix to petition for certiorari, p. 22).

This Court has noted the same reality:

> "In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

Mr. Justice Powell, agreeing that "for most citizens the prospect of personal familiarity with

newsworthy events is hopelessly unrealistic," sees the press acting as the "agent" of the public at large. Saxbe v. Washington Post Co., supra, 417 U.S. at 863 (dissenting opinion). In this representative capacity the press can, with reasonable but somewhat different access than the general public, satisfy the public need for information without undermining any substantial governmental interest.30/

30/ See also Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505, 1522 (1974). A California prison official, preferring that the press act as agent for the public instead of relying on public tours, put it this way:

"A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the president of the local Ladies' Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs. The media does a good job of reporting in most instances, and prison administrators should have no qualms about admitting responsible reporters to view prison activities and to interview men in these programs." Park, On Being Medium Nice to Prisoners, Wash. U.L.Q. 607, 615 (1973).

In summary, neither the holding of Pell and Saxbe nor sound policy requires that identical time, place and manner restrictions be imposed on press and public. Freedom "of the press" need not be defined in all circumstances by the rights of the public at large. If the Free Press guarantee meant no more than every citizen's right of Free Speech, "it would be a constitutional redundancy." Stewart, "Or of the Press," 26 Hastings L.J. 631, 633 (1975).

II. The Sheriff's Access Restrictions Are Far Greater Than Necessary To Protect Any Substantial Governmental Interest.

As discussed above, Pell and Saxbe do not require that the means of press and general public access to information be blindly equated regardless of the circumstances. Rather, the decisions in those cases followed from application of a traditional First Amendment test -- whether the particular restriction on First Amendment activity was in fact justified by an important governmental interest. Since there was evidence that prison security was actually endangered (at least at the time) by designating individual prisoners for interviews, and since the narrow no-interview rule did not constrict

the otherwise free flow of information through the press, the Court upheld the rule.

In other words, Pell and Saxbe did not mark a departure from settled First Amendment principles. Under those principles, a jailer's restriction on First Amendment interests is justified only if, first, the restriction furthers "an important or substantial governmental interest unrelated to the suppression of expression," and second, the limitation of First Amendment freedoms is "not greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 416 U.S. 396, 419 (1974). See also United States v. O'Brien, 391 U.S. 367, 377 (1968); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960).31/

In the present case, the district court

31/ In Linmark Associates, Inc. v. Township of Willingboro, ___ U.S. ___, 97 S.Ct. 1614, 1619 (1977), the Court acknowledged that an ordinance might serve an important purpose but, absent evidence that it was necessary to that purpose, held that city officials could not restrict "the free flow of truthful information." The sheriff agrees that United States v. O'Brien, supra, states the correct test (Petitioner's Opening Brief, p. 20), but fails to apply it to the facts of this case.

found that the sheriff's access restrictions were greater than necessary to protect any important interest. Apart from the bland generality that the district court should have shown more "deference" to the sheriff because the problems "are not amenable to solution by judicial decree,"32/ petitioner advanced three kinds of interests alleged to justify his restrictions:

32/ This is not a "prisoners rights" case involving the knotty problems of daily confrontations between keepers and kept. We recognize that courts must consider the views of corrections officials, as the district court indeed did in this case. But appropriate concern for their views "cannot encompass any failure to take cognizance of valid constitutional claims. . . . When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." Procunier v. Martinez, 416 U.S. 396, 405 (1974) (First Amendment and due process protection for outsider-prisoner communication); see also Bounds v. Smith, ___ U.S. ___, 97 S.Ct. 1491 (1977) (prisoners' access to courts); Estelle v. Gamble, ___ U.S. ___, 97 S.Ct. 285 (1976) (prisoner medical care); Wolff v. McDonnell, 418 U.S. 539 (1974) (procedural due process protection against in-prison punishment); Cruz v. Beto, 405 U.S. 319 (1972) (First Amendment, equal protection); Lee v. Washington, 390 U.S. 333 (1968) (equal protection). No decision of this Court indicates that the views of a county jailer are entitled to unquestioning acceptance.

(1) jail security; (2) avoidance of disruptions caused by unscheduled "tours," and (3) protection of inmate privacy and against undue pretrial publicity.

1. Jail Security.

Jail security is certainly a legitimate interest. But the district court found on more than ample evidence that restricting access in the way the sheriff does is not necessary to protect jail security and that access like that routinely afforded in other prisons and jails in the area would not jeopardize security (A. 69). The sheriff has not challenged, nor could he challenge, the district court's findings as clearly erroneous. Fed. R. Civ. P.52. There is "substantial evidence in the record" demonstrating that petitioner has "exaggerated" security concerns. See Pell v. Procunier, supra, 417 U.S. at 827.[33/] And in any event the district court's order expressly acknowledges the sheriff's authority to refuse all access if jail

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33/ As for any purely subjective anxiety the sheriff may have, "in our system, undifferentiated fear or apprehension of disturbance is not enough" to restrict First Amendment rights. Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969).

tensions might threaten security (A. 71).

Although access alone would not endanger security, petitioner's brief asserts that permitting photography would create a risk because there are alarm and locking devices in the jail which should not be photographed. Petitioner has not suggested who might disobey instructions not to photograph them, or why. This matter was never mentioned when the sheriff excluded KQED and others from any access (Tr. 172,209). But in any event prisoners themselves can at their leisure sketch the devices in detail, as pointed out by the district court (A. 69; Tr. 117). Further, prisons like San Quentin of course have sophisticated security devices, and they have no problems in permitting news photography, even in maximum security sections (Tr. 147-48, 150). Filming news coverage in numerous jails and prisons is routinely done without resultant security problems (Tr. 167-71, 196, 216; A. 10, 13, 14-15, 64-65, 69). News photography was permitted in the institutions involved in Pell and Saxbe. Finally, petitioner testified that he would have no problem with newsmen using cameras on a press tour, as opposed to a public tour, "as often as the court

might deem suitable" (Tr. 111-12, 116). In short, while the sheriff may determine that certain limitations on camera use are reasonably required, an absolute ban on cameras is not dictated by jail security.

2. Disruption by unscheduled "tours".

The sheriff's most frequently-expressed concern is the inconvenience that press "tours" might cause if provided "on demand". Thus his brief emphasizes several times that "tours" disrupt the "tight schedule" of inmate movements during the day and cause related administrative difficulties. He says that during a tour "inmates must be locked in their cells or otherwise removed from contact with the visitors" and that therefore jail movements "come to a halt" (Id.).

But all of this is built entirely on petitioner's own notion that any access necessarily involves a cumbersome "tour." Nothing could be further from reality, as the sheriff well knows. The interest of KQED is not in having "tours", and the district court order does not require any such thing. Conducting unwieldy guided tours was solely the sheriff's idea. KQED's main interest is in being able to cover

events of public interest as soon thereafter as access can safely be provided. This involves the opportunity for a reporter to spend a few minutes at the scene (e.g. the escapee's hole in the fence, the charred remains of the dormitory, the new basketball court, the bleak cell where the suicide took place, etc.). This does not require locking up inmates or delaying any inmate movement at all.[34/] Access for a specific and limited purpose does not involve any "tour." Nor does it entail any disruption, or doing anything different from what the record shows is the routine practice in the other local jails and prisons, i.e., access on reasonable notice to cover a particular event.[35/]

The district court's order, providing

34/ A large number of civilians -- social workers, investigators, teachers, butchers, bakers, nurses, religious counselors -- come and go within and around the jail every day, without prisoners being locked up or normal movements stopping (Tr. 68-71).

35/ Nor is there likely to be any deluge of press requests. When San Quentin first opened its notorious maximum security section to reporters there was some initial interest, but no requests at all in the two months before the hearing in this case (Tr. 151-52).

for access "at reasonable times and hours" and authorizing the sheriff to lay down the ground rules for such access, fully protects the sheriff's interest in avoiding administrative disruption.

3. Inmate privacy and pretrial publicity.

The sheriff's professed concern for protecting the privacy of the prisoners does not justify denial of access. The evidence shows that KQED and other press representatives do not photograph or interview prisoners without their consent (A. 11; Tr. 150, 170-71, 201-2), and the sheriff is free to make this a firm and formal requirement. Although petitioner also claims a desire to protect detainees awaiting trial from pretrial publicity, this is a red herring. In the first place, he in fact permits photographs and interviews of pretrial detainees, regardless of any security or publicity problems, provided only that formal consent is obtained (Tr. 89, 91, 97, 118). In the second place, the right to a fair trial is the right of the accused, not the jailer. See Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976); Chicago Council of Lawyers v. Bauer,

522 F.2d 242, 250 (7th Cir. 1975), and cases cited. The sheriff is not under any duty to prevent pretrial statements.[36/] Nor can he be permitted to use a "pretrial publicity" claim to suppress prisoner statements about the conditions of their confinement -- the subject of this suit.

Finally, the record affirmatively shows that none of the sheriff's objections is in fact

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36/ On the contrary, jailers sometimes collect pretrial statements for use against the criminal defendant. See, e.g. Lanza v. New York, 370 U.S. 139 (1962). The "fair trial-free press" decisions relied on by the sheriff are not in point. In Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975), the court merely upheld a rule against taking photographs in a courthouse, pointing out that the rule was intended to insure a fair trial for defendants. (In addition, the photographer had in fact created an actual disturbance at the courthouse, and had taken pictures of prisoners without their consent.) Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958), upheld the same rule against taking photographs in and around the courtroom. Estes v. Texas, 381 U.S. 532 (1965), and Sheppard v. Maxwell, 384 U.S. 333 (1966), simply recognize the right of a criminal defendant not to have a massively publicized trial. All these fair trial cases emphasize the accused's right to a dignified and deliberative judicial setting. They do not apply to inquiries into conditions at a jail.

a problem. The record includes the experience of other jail and prison administrators and the considered opinion of experts in the field. The Sheriff of San Francisco County (Tr. 189-203) and the San Quentin official (Tr. 143-65) dealt in concrete detail with all of petitioner's objections -- security, administrative disruption and privacy. They demonstrated that admitting reporters on reasonable notice did not present any problems whatever. Finally, the experience of KQED and other reporters in covering events on the premises of many other jails and prisons shows that they can be permitted to do their newsgathering job without interfering with any valid correctional interest.[37/]

Thus, unconvinced that reasonable press access would harm any interest of the sheriff, the district court properly granted a preliminary injunction, and the Court of Appeals unanimously affirmed. Petitioner has presented no

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37/ There is also the expert judgment of national authorities in the field -- the standards of the National Advisory Commission on Criminal Justice Standards and Goals, and the Policy Statement of the Federal Bureau of Prisons (see pp. 14-15, supra) -- providing for open news access to correctional institutions.

reason why this Court should disturb the decisions below.

III. The District Court Properly Found That The Sheriff's "Alternative Means of Communication" Do Not Serve The Same Purposes Or Meet The Public Need for Information On Jail Conditions.

Petitioner has been busily improving his public relations image at each stage of this litigation. Before he was sued, the sheriff's "policy" was clear and unequivocal -- complete exclusion of both press and public.[38/] When suit was filed, petitioner quickly announced the series of six monthly tours, as well as liberalized mail and visiting rules (A. 28-31). When it was brought out at the hearing on the preliminary injunction that the tours were completely booked within a week and so there was no other press or public access for the rest of the year (Tr. 116-17; see p. 7, supra), the sheriff announced that he wished to continue the tours for the next six months, and possibly

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38/ Further, his jail rules provided for censorship of all correspondence, even letters of pretrial detainees, and forbade prisoners to mention the "names or actions" of any guard or other official (A. 19). Compare Procunier v. Martinez, 416 U.S. 396 (1974).

beyond, although he had not yet presented the proposal to the Board of Supervisors (Tr. 81-82). He also testified that he would be willing to hold special tours for the press, with their cameras and with random interviews, "as often as the court might deem suitable" (Tr. 111-12, 116). (The Sheriff has never explained why no such press tours have been announced or carried out.) When the district court issued a preliminary injunction, petitioner in his stay application declared that public tours would then be held twice monthly and offered to have photographs taken of scenes that had been conspicuous by their omission ("appendix" to Petitioner's Opening Brief, p. 2-3).39/

39/ Most recently, in his petition for certiorari to this Court (p. 9), he asserted that reporters were occasionally being let in the jail for news coverage of "special events" like fires and escapes. The sheriff was apparently deciding for himself what was "news" and either allowing or disallowing access. While this "spot news" contention has disappeared from petitioner's brief on the merits, KQED vigorously denies that it is being allowed access to the jail to cover news events, and we have never seen any rules or policy statements authorizing such coverage. (Information about a recent women's riot did not leak out to the public until nearly two weeks after the event. See Appendix to Brief in Opposition to Petition for

Here, much of the sheriff's brief is devoted to descriptions of prisoner mail, visiting and telephone rules, in addition to the guided tours. These are said to provide substantial access to jail prisoners, or by jail prisoners to outside persons. Petitioner's argument derives from the discussion in Pell of "alternative means of communication" available to prisoners. 417 U.S. at 823. The sheriff misses the point, however, because the Pell opinion shows that alternative means were relevant only to the prisoners' asserted right to be interviewed by reporters, not to the journalists' asserted First Amendment interests. The Court declined to declare a new and unusual prisoner's

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39/ continued.

Certiorari.) Even if the sheriff's assertion on "special event" coverage were true -- a matter this Court should surely not attempt to determine -- such ad hoc and standardless granting of special access would itself be constitutionally suspect as permitting discrimination on the basis of "the content of the expression." Pell v. Procunier, supra, 417 U.S. at 828; see also Southeastern Productions Ltd. v. Conrad, 420 U.S. 546, 553 (1975); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969); Main Road v. Aytch, 522 F.2d 1080, 1098 (3d Cir. 1975).

right when there were both proven security dangers and alternative ways for a prisoner to reach an outside ear. Even the existence of adequate means of reaching outsiders was not in itself conclusive of the prisoner's right. Pell, supra, 417 U.S. 823-24; see also Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). Compare Linmark Associates, Inc. v. Township of Willingboro, ___ U.S. ___, 97 S.Ct. 1614, 1618 (1977), where the Court unanimously rejected an argument that an ordinance restricting one means of communication (For Sale signs) was saved by the availability of alternative means (e.g. newspaper advertisements). The Court said, in terms directly applicable here, that there was serious question about the adequacy of the alternative means to serve the intended purpose, and that the alternatives were "far from satisfactory" because they were "less likely to reach persons not deliberately seeking" the information. 97 S.Ct. at 1618. See also Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976), where the Court pointed out that the restrictive prison rules in Procunier v. Martinez, supra, were not saved by the fact that the addressees of prisoner letters

"could have visited the prisoners themselves," and noted that alternative means of reaching intended recipients in other cases did not change the results. 425 U.S. at 757, n.15.

The "alternatives" advanced by petitioner here are not intended to and could not conceivably serve the purpose of providing the public with timely and accurate information on jail conditions and important events there. As to mail, it is wholly unrealistic to expect that jail inmates, confined for a few days in the county jail,[40/] will have either the interest or the ability (many are illiterate) to convey to anyone useful information about conditions at the jail. Almost 75% of the pretrial detainees are in jail for five days or less (D.Exh.F, second page). Even assuming that a prisoner wrote to a reporter, no responsible journalist would publish unsubstantiated information from a prisoner's letter. As KQED's news anchorman testified, there must be an opportunity to get the "other side of the picture," to check the

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40/ According to the Sheriff's evidence, pretrial detainees spend an average of 10 days in the jail, and sentenced prisoners an average of 32 days (Tr. 84-85).

story and to verify any prisoner allegations (Tr. 175, 186). Also, of course, prisoner letters do not give either press or public any opportunity to view the conditions in question.41/

As for visiting, it is most unlikely that reporters (or any specially interested members of the general public) would know any individual prisoner to ask for at the jail. Even if they knew the identity of a prisoner or two, this would be of no help in investigating a particular event. Visiting hours for sentenced prisoners are limited to three hours on Sunday, and most pretrial detainees are hardly in the jail long enough for a visit. Also, of course, visiting a prisoner gives the visitor only a view of the visiting room, not the actual living conditions or the scene of the event at the jail (Tr. 72).42/

41/ Use of the telephone for collect calls has substantially the same defects, even assuming that any news organization accepted collect calls from prisoners.

42/ If a prisoner is a pretrial detainee, the sheriff allows a press "interview," as opposed to a "visit," provided that the reporter obtains the formal written consents of (a) the prisoner, (b) his attorney, (c) the District Attorney and

Perhaps the scene could be viewed on petitioner's next guided tour. That depends on

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42/ continued.

(d) the court having jurisdiction (A. 30). Obtaining all the required consents is both impossibly burdensome and quite unnecessary (absent a proper "gag" order). Let us assume that a detainee wrote a letter to KQED making serious allegations of some wrongdoing at the jail. A reporter could write him back requesting prompt written consent for an interview and the name of his attorney. The reporter could then get the attorney's consent. But for unexplained reasons petitioner requires, in addition, the consent of the District Attorney. And finally, petitioner requires consent of the court. This means that the reporter may have to hire a lawyer (a public station like KQED does not have in-house counsel), and hope to get the matter on the court's busy calendar without undue delay. These additional required consents are solely the creation of the sheriff and are not imposed by any statute, regulation or court decision. Nor, as explained at pp. 50-51, supra, are they necessary to serve any legitimate interest of the sheriff. But they are well calculated to make interviews a virtual impossibility. They hardly promote the "alternative means of communication" claimed by petitioner. And even if an extremely persistent reporter obtained an interview, jail conditions and the scene of the event would still remain hidden from view. (Similar problems attend an attempt to get the facts from a recently released prisoner. Even if a reporter had the extraordinary

whether the guards choose to include it, a matter over which the tourists have no say. And even if it were included, it could not be photographed. Finally, as much as two weeks after the event, the scene might appear as scrubbed and bland as the photographs sold by petitioner.

The problems with the guided tours have been discussed above (pp. 8-10, supra). For a few citizens they do provide a look at the physical plant (with some notable exceptions). But spiriting prisoners out of the way creates an unreal jail, more like a mausoleum. Prohibiting simple questions of randomly encountered inmates cripples understanding of what is seen or what may have happened. Absolutely banning cameras leaves only petitioner's sterile stills of selected buildings and equipment. As Mr. Justice Powell recently said, the public is "the loser" when news coverage is limited to "watered-down verbal reporting, perhaps with an occasional still picture. . . . This is hardly

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42/ continued.

fortune of locating such a person who had knowledge of the event in question, there would be no way to verify his information by checking the scene.)

the kind of news reportage that the First Amendment is meant to foster." Zacchini v. Scripps-Howard Broadcasting Co., ___ U.S. ___, 97 S.Ct. 2849, 2860 (1977) (dissenting opinion).43/

Probably the most serious problem with the tours is their very nature as scheduled and periodic. They are basically irrelevant to the need to cover an event of public concern and get timely and complete information to the general citizenry. The event will not await the next scheduled tour.44/ Exclusion except for the tours necessarily means that important events will be missed, possible abuses suppressed and the public left ignorant of matters of

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43/ 64% of the American public now get most of their news "about what's going on the world today" from television news as opposed to all other sources. The Roper Organization, Changing Public Attitudes Toward Television and Other Mass Media, 1959-1976, 3 (May, 1977).

44/ As Mr. Justice Blackmun reasoned, considering a restriction on reporting by news media, First Amendment interests are infringed each day the restriction continues: "The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." Nebraska Press Ass'n. v. Stuart, 423 U.S. 1327, 1329 (1975).

which they have a right to be informed.

CONCLUSION

"Sunlight is said to be the best of disinfectants." Louis D. Brandeis, Other People's Money, 92 (1914). The district court order would let a little sunlight in the county jail. For the reasons stated above, it should be affirmed.

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